PART V

BENEFITS REVIEW BOARD POLICIES AND PROCEDURES

A. SCOPE OF REVIEW

9. ISSUES ON APPEAL

The Board's review of administrative law judge decisions is generally confined to issues raised in the petitioner's appeal, *see* ***White v. Douglas Van Dyke Coal Co.***, 6 BLR 1-905 (1984), and issues properly raised in cross appeals. The Board will, however, consider issues raised for the first time in response briefs that are argued in support of the final order below. ***King v. Tennessee Consolidation Coal Co.***, 6 BLR 1-87 (1983). The appealing party is limited in the issues it may raise since the Board follows the well established principle that issues not effectively presented to an administrative law judge, where ample opportunity to do so has been afforded, cannot be raised on appeal. Where the issue of eligibility, even if thought to be fundamental to the proper administration of the Act, has been held by the Board to be waived if not properly raised while the case is before the district director. *See* ***Mullins v. Director, OWCP***, 11 BLR 1-132 (1988)(en banc)(Ramsey, CJ., dissenting), *reversing* 7 BLR 1-561 (1984)(Ramsey, C.J., concurring on this issue)(Smith, J., dissenting). Exceptions to the general rule are where a pertinent statute has been overlooked below, ***Walker v. Manufacturing Co. v. Dickerson, Inc.***, 560 F.2d 1189, 1187 n.2 (9th Cir. 1977), or where there is a change of law while a case is pending on appeal and the new law might have materially altered the result. ***Reilly v. Director, OWCP***, 7 BLR 1-139 (1984); ***Slinker v. Peabody Coal Co.***, 6 BLR 1-456 (1983).

The Board will not usually consider on appeal issues that have not been raised before the administrative law judge. ***Taylor v. 3D Coal Co.***, 3 BLR 1-350 (1981). The Board has, however, created four general exceptions to these rules. First, the Board will consider an issue for the first time on appeal where a pertinent statute has been overlooked. *See* ***Walker Mfg. Co. v. Dickerson, Inc.***, 560 F.2d 1184, 1187 n.2 (4th Cir. 1977); ***Free v. Director, OWCP***, 6 BLR 1-450 (1983). Second, where an issue is raised for the first time on appeal, and supports the administrative law judge's Decision and Order, the Board will permit its consideration. *See* ***King v. Tennessee Consolidated Coal Co.***, 6 BLR 1-87 (1983). Third, the Board will consider an error in the administrative law judge's Decision and Order which is basic to the proper administration of the Act or to the rendering of justice. *See* ***Shelton v. Washington Post Co.***, 7 BRBS 54 (1977). And fourth, review is proper where, as the Supreme Court held, "there have been judicial interpretations of existing law after the decision below and pending appeal--interpretations which if applied might have materially altered

the result." ***Hormel v. Helvering***, 312 U.S. 552, 558-59 (1941); *see also* ***Witherow v. Rushton Mining Co.***, 8 BLR 1-232 (1985) where the Board declined to raise an issue where the law had changed during the pendency of the appeal since the party had failed to avail itself of the opportunity to file a supplemental brief setting out its position during the eight months between the date of the announced change of law and the Board's Decision and Order in that case. The Board presumes that members of the bar who hold themselves out as qualified to undertake the litigation of black lung cases are capable of adequately representing their clients' interests and that, absent an allegation by a party that counsel is incompetent, the Board must assume that counsel has limited raised contentions for tactical reasons.

CASE LISTINGS

[where party had opportunity to object to a trier-of-fact's action and failed to do so, objection is waived and cannot be raised on appeal to Board]. ***Kauzlarich v. Director, OWCP***, 4 BLR 1-744 (1982).

[Board will not normally address new arguments raised in reply briefs] ***Senick v. Keystone Coal Mining Co.***, 5 BLR 1-395 (1982).

[Board will consider, without cross-appeals, issues raised first time in response briefs that are argued in support of final order below; cross-appeals required where prevailing party seeks to alter or amend final order below] ***King v. Tennessee Consolidated Coal Co.***, 6 BLR 1-87 (1983).

[raising the tracings issue is sufficient to put other aspects of quality standards of Section 410.430 at issue] ***Crapp v. United States Steel Corp.***, 6 BLR 1-476 (1983).

[Board will address issues regarding mandatory quality standards even though raised for first time on appeal] ***Witt v. P & P Coal Co.***, 6 BLR 1-480 (1983); ***Crapp v. United States Steel Corp.***, 6 BLR 1-476 (1983).

[Board will not consider Section 725.493(a)(6) argument for first time on appeal] ***McKinney v. Benjamin Coal Co.***, 6 BLR 1-529 (1983).

[offset may be raised for the first time on appeal] ***Crider v. Dean Jones Co.***, 6 BLR 1-606, 1-610 (1983).

[failure to object to consideration of unchecked issues before trier-of-fact precludes raising of this issue on appeal] ***Grant v. Director, OWCP***, 6 BLR 1-619 (1983).

[employer's failure to object to admission of evidence before trier-of-fact waived right to raise on appeal] ***Pendleton v. United States Steel Corp.***, 6 BLR 1-815 (1984).

[claimant sufficiently objected to affidavit's admission on appeal where she alleged that admission denied right to cross examine the affiant] ***White v. Douglas Van Dyke Coal Co.***, 6 BLR 1-905 (1984).

[cross-appeal is necessary for party who prevailed below to contest on appeal finding of fact or conclusion of law that would change some aspect of decision below] ***Shelesky v. Director, OWCP***, 7 BLR 1-34 (1984); *see also* ***King v. Tennessee Consolidated Coal Co.***, 6 BLR 1-87 (1983).

[Board declined to allow Director to change argument on appeal simply because Director substituted as respondent] ***Patellos v. Director, OWCP***, 7 BLR 1-661 (1985).

[contention regarding bias of physicians will not be addressed by Board if raised for first time on appeal] ***Maypray v. Island Creek Coal Co.***, 7 BLR 1-683 (1985); ***Lyon v. Pittsburgh & Midway Coal Co.***, 7 BLR 1-199 (1984).

[Third Circuit held that Director may change position during course of a claim if change supported by reasonable explanation] ***Pavesi v. Director, OWCP***, 758 F.2d 956, 7 BLR 2-184 (3d Cir. 1985).

[Board declined to disturb decision below to impose liability on Trust Fund rather than employer where Director failed to preserve defense of waiver for appeal] ***Hedrick v. Green Construction Company of Indiana, Inc.***, 7 BLR 1-783 (1985).

[The Board will address the applicability of Section 413(b) on its own motion] ***Pulliam v. Drummond Coal Co.***, 7 BLR 1-846 (1985); *see also* ***Free v. Director, OWCP***, 6 BLR 1-450 (1983).

[where employer is dismissed as responsible operator and Director did not participate at hearing or submit brief on appeal contesting finding of entitlement, Board will hold Trust Fund liable for benefits] ***Sisko v. Helen Mining Co.***, 8 BLR 1-272 (1985); ***Crabtree v. Bethlehem Steel Corp.***, 7 BLR 1-354 (1984).

[Board raised *sua sponte* that record on appeal was devoid of transcript remanding for new hearing on the record or production of complete record of prior hearing as complete record is necessary to exercise review authority required by the Act] ***Mansfield v. Director, OWCP***, 8 BLR 1-445 (1986).

[Tenth Circuit denied dismissed carrier's request for attorney fees and costs to be assessed against employer for alleged bad faith concealment of a Black Lung Insurance policy with another carrier where court found that issue neither presented to nor decided

by Board] ***Big Horn Coal Co. v. McLean***, No. 84-1788 (10th Cir., Dec. 18, 1985) (unpub.).

[Sixth Circuit held that applicability of Section 411(c)(4) could be raised for first time on appeal] ***Freeman v. Director, OWCP***, 781 F.2d 79, 8 BLR 2-94 (6th Cir. 1986).

[Seventh Circuit held that Director could contest award and benefit from evidence developed by dismissed employer notwithstanding Director's previous support of award prior to substitution under 1981 Amendments; court stated "there is nothing like the prospect of financial loss to concentrate the mind." ***Hardisty v. Director, OWCP***, 775 F.2d 129, 8 BLR 2-72 (7th Cir. 1985); *cf.* ***Patellos v. Director, OWCP***, 7 BLR 1-661 (1985).

DIGESTS

The Sixth Circuit held that where claimant failed to raise the issue of the administrative law judge's alleged bias, by filing an affidavit articulating the facts and reasons and justifying the charge, until after an adverse decision on the merits,, claimant failed to preserve the issue for appeal. ***Orange v. Island Creek Coal Co.***, 786 F.2d 724, 8 BLR 2-192 (1986).

The Third Circuit declined to decide issues that had not been raised on appeal to the Board. ***Bernardo v. Director, OWCP***, 790 F.2d 351, 9 BLR 2-26 (3d Cir. 1986).

The Board addressed the issue of jurisdiction raised by employer initially, and solely, in his response brief, since if employer's assertion was decided in his favor, it would maintain the *status quo* of the ultimate decision below. ***Persinger v. North American Coal Co.***, 9 BLR 1-18, 1-19 n.1 (1986).

The Board declined to consider claimant's argument that physician's opinion was hostile to the Act as claimant failed to raise this issue at the hearing level. ***Kurcaba v. Consolidation Coal Co.***, 9 BLR 1-73 (1986).

In a case remanded from the Third Circuit, the Board held that it would not address the applicability of Section 411(c)(4) of the Act or consider arguments pertaining to 20 C.F.R. §727.203(a)(2) and (b)(2) as those issues were raised by the parties for the first time before the court rather than at the earliest possible stage of the proceedings. ***Bernado v. Director, OWCP***, 9 BLR 1-97 (1986).

The Board held that 53 Fed Reg. 27295 (1985)(to be recodified at 20 C.F.R. §802.211), which became effective August 19, 1987, does not lessen the procedural requirements of the old standard at Section 802.210. The Board, considering this case pursuant to

the old standard at Section 802.210 because the petition for review was filed prior to the effective date of the new regulation, found claimant's petition for review insufficient for lack of specificity. ***Sarf v. Director, OWCP***, 10 BLR 1-119 (1987).

The Board reversed the administrative law judge's award of benefits and refused to consider the issue of length of coal mine employment raised by claimant on reconsideration, as this issue was not raised in a separate appeal or cross-appeal. The Third Circuit remanded the case for consideration of length of coal mine employment, holding that where a party is satisfied with the judgment below, he is not required to appeal it. ***Dalle Tezze v. Director, OWCP***, 814 F.2d 129, 10 BLR 2-62 (3d Cir. 1987).

While an appellate court generally will not address an issue that was not presented below, an exception is made if raising the issue would have been futile. ***Kyle v. Director, OWCP***, 819 F.2d 139, 142, 10 BLR 2-112, 2-115 (6th Cir. 1987); *see also* ***Youghiogheny & Ohio Coal Co. v. Warren***, 841 F.2d 134, 11 BLR 2-73 (6th Cir. 1987).

The Board held that the issue of eligibility as a widow or surviving divorced spouse is waived if not properly raised on appeal notwithstanding that this issue may be considered fundamental to the proper administration of the Act. ***Mullins v. Director, OWCP***, 11 BLR 1-132 (1988)(en banc)(Ramsey, CJ., dissenting), *reversing* 7 BLR 1-561 (1984)(Ramsey, C.J., concurring on this issue)(Smith, J., dissenting).

Because the issue of the viability of a claim is one of jurisdiction, it can be raised at anytime. ***Kubachka v. Windsor Power House Coal Co.***, 11 BLR 1-171 (1988).

In a case where the Board raised a circuit court's change in the 20 C.F.R. §727.203(b)(2) rebuttal standard *sua sponte*, the Board holds that employer is not deprived of a fair hearing where claimant has raised subsection (b)(2) on appeal. ***Toler v. Eastern Associated Coal Corp.***, 12 BLR 1-49 (1988)(citing ***Homel v. Helvering***, 312 U.S. 552, 558-59 (1941).

Where the Board raises legal rebuttal issues due to a subsequent change in the circuit court law and additional facts are necessary to decide the case, the proper course is *not* for the Board to require supplemental briefs. Rather, the case should be remanded to the administrative law judge to make the appropriate finding of fact. ***Toler v. Eastern Associated Coal Co.***, 12 BLR 1-49 (1988)(en banc)[distinguishing ***Witherow v. Rushton Mining Co.***, 8 BLR 1-232 (1985)].

The Board will consider issues raised by a responding party that are not in a cross-appeal where the issue provides an alternative basis upon which the Board may affirm the ultimate disposition of the administrative law judge. ***Whiteman v. Boyle Land and Fuel Company***, 15 BLR 1-11 (1991)(en banc); *see* ***Dalle Tezze v. Director, OWCP***, 814 F.2d 129, 10 BLR 2-62, (3d Cir. 1987); ***King v. Tennessee Consolidation Coal***

Co., 6 BLR 1-87 (1983).

The Board rejected employer's contentions in its second appeal to the Board that it should be allowed to challenge the administrative law judge's original finding at 20 C.F.R. §727.203(a)(1) and (a)(2). Inasmuch as employer had full opportunity to challenge the administrative law judge's findings at 20 C.F.R. §727.203(a)(1) and (a)(2), but failed to do so, the Board declined to address employer's present contentions regarding the administrative law judge's original findings at Section 727.203(a)(1) and (a)(2) since they had already been affirmed as unchallenged on appeal when the case was originally before the Board. ***Gillen v. Peabody Coal Co.***, 16 BLR 1-22 (1991) (Stage, CJ., dissenting).

Although the Director should have ascertained prior to the administrative hearing level, when Dr. Scattergia's opinion was admitted, that the opinion was incomplete and, therefore, insufficient to fulfill the Department of Labor's statutory obligation, *see generally* ***Crabtree v. Bethlehem Steel Corp.***, 7 BLR 1-354 (1984), the fair adjudication of claimant's case cannot be undermined by such lapse on the part of the Director. ***Hodges v. BethEnergy Mines, Inc.***, 18 BLR 1-84 (1994); *see generally* ***Beckett v. Raven Smokeless Coal Co.***, 14 BLR 1-43, 1-45 (1990).

The Board held that the restrictions on briefs filed under 20 C.F.R. §802.212, *see* ***Malcomb v. Island Creek Coal Co.***, 15 F.3d 364 (4th Cir. 1994), are inapplicable when the Director has filed a motion for remand, *see* 20 C.F.R. §802.219. ***Hodges v. BethEnergy Mines, Inc.***, 18 BLR 1-84 (1994).

In ***Barnes v. Director, OWCP***, 18 BLR 1-55 (1994), the Board initially addressed the requirement at 20 C.F.R. §802.212 that arguments in response briefs must be limited to those that respond to issues raised in petitioner's brief or those in support of the decision below, holding that as claimant's petition for review failed to raise any specific allegations of error by the administrative law judge and thus provided the Board with no basis for reaching the merits of the appeal, *see* ***Sarf v. Director, OWCP***, 10 BLR 1-119 (1987); ***Cox v. Benefits Review Board***, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); ***Fish v. Director, OWCP***, 6 BLR 1-107 (1983), arguments raised by the Director could not be considered responsive to claimant's arguments, and thus would not be considered by the Board on appeal. On reconsideration en banc, the majority of the Board held that as the Director's brief responded to claimant's general allegation that the administrative law judge erred in failing to award benefits, the Director's brief was sufficiently responsive to satisfy the requirements of Section 802.212, and thus the Board agreed to address the Director's contentions on appeal. In his dissenting opinion, Judge Smith stated that he would hold that as claimant raised no specific error, the Director was precluded from responding within the meaning of 20 C.F.R. §802.212(b). ***Barnes v. Director, OWCP***, 19 BLR 1-71 (1995) (en banc reconsideration)(Smith, J., dissenting), *affirming in part and vacating in part* 18 BLR 1-55 (1994).

The Board recognized that statutory authority provides that the "Board may, on its own motion or at the request of the Secretary, remand a case to the administrative law judge for further appropriate action. The consent of the parties in interest shall not be a prerequisite to a remand by the Board." 33 U.S.C. §932(a). Consequently, the Board recognized that the Director, as designee of the Secretary, *see* 20 C.F.R. §726.6, has statutory authority to request that a case be remanded to the administrative law judge. Additionally, while Section 802.212(b) provides that arguments in response briefs shall be limited to those which respond to arguments raised in the petitioner's brief and to those in support of the decision below, the Board noted that the Director had filed a Motion to Remand. The Board recognized that a Motion to Remand is distinct and separate from a response brief. *See* 20 C.F.R. §§802.212, 802.219. Consequently, the Board held that the Director, having filed a Motion to Remand, was not limited to raising arguments that either responded to arguments raised in claimant's brief or supported the decision below. ***Kingery v. Hunt Branch Coal Co.***, 19 BLR 1-6 (1994)(en banc).

The Board will not consider additional information regarding successor operators in a motion for reconsideration which was not before the administrative law judge or the Board in its previous decision on appeal. ***Williams v. Humphreys Enterprises, Inc.***, 19 BLR 1-111 (1995).

Because employer waived its right to object to the admission of evidence by the administrative law judge, the Board held that employer was precluded from arguing for the first time on appeal that claimant's exhibits were admitted in violation of Section 725.456(d). ***Dankle v. Duquesne Light Co.***, 20 BLR 1-1 (1995).

Claimant's contention that the Director is precluded from raising the issue of survivorship for the first time on reconsideration was rejected. Where the Director is satisfied with the ultimate conclusion that claimant did not qualify for benefits, she cannot be bound to have waived the issue for failure to raise her dissatisfaction in non-dispositive issues in a response brief. ***Reigh v. Director, OWCP***, 20 BLR 1-44 (1996), *modifying on recon.*, 19 BLR 1-64 (1995).

Inasmuch as claimant was satisfied with the result of the administrative law judge's decision, she was not required to file a cross-appeal pursuant to 20 C.F.R. §802.201(a)(2), but could make arguments in her response brief pursuant to 20 C.F.R. §802.212(b) which were not in support of the administrative law judge's reasoning but which supported the result he reached. ***Jones v. Badger Coal Co.***, 21 BLR 1-102 (1998)(*en banc*).

A party does not waive its right to raise, for the first time on appeal, the issue of the timeliness of a duplicate claim when raising this issue before the administrative law judge would have been futile. ***Furgerson v. Jericol Mining, Inc.***, 22 BLR 1-217 (2002); ***Abshire v. D&L Co.***, 22 BLR 1-202 (2002).

The Board held that employer waived its argument that, pursuant to the decision of the United States Court of Appeals for the Sixth Circuit in ***Tennessee Consolidation Coal Co. v. Kirk***, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), claimant's duplicate claim was time barred by 20 C.F.R. §725.308. The Board held that employer waived the timeliness issue because it withdrew the issue at the hearing, four days after the court issued its decision in ***Kirk***. The Board held that, moreover, employer had not attempted to cure its failure to raise the timeliness argument pursuant to ***Kirk*** even eight months after ***Kirk*** was issued, when it filed its closing brief before the administrative law judge. In holding that employer waived its timeliness argument, the Board also rejected employer's argument that the Board's decisions in ***Furgerson v. Jericol Mining, Inc.***, 22 BLR 1-217 (2002), and ***Abshire v. D & L Coal Co.***, 22 BLR 1-202 (2002), issued after employer withdrew the timeliness issue before the administrative law judge, constituted intervening authority because, in those two cases, the Board clarified how it would construe and apply ***Kirk***. The Board held that, notwithstanding that the Board did not construe and apply the court's decision in ***Kirk*** until it issued ***Furgerson*** and ***Abshire***, the court's holding in ***Kirk*** -- ***i.e.,*** that the time limitation set forth in Section 422(f) of the Act, 30 U.S.C. §932(f), as implemented by 20 C.F.R. §725.308, applies to duplicate claims -- became controlling law at the time the court issued ***Kirk***. ***Chaffin v. Peter Cave Coal Co.***, 22 BLR 1-294 (2003).

In order to invoke Board review of an administrative law judge's findings, a party must identify specific errors committed by the administrative law judge in his consideration of the evidence. In this case, employer's general allegation that the administrative law judge erred in crediting the opinions of Drs. Houser and Cohen on the issue of total disability causation did not properly invoke Board review. ***Harris v. Old Ben Coal Co.***, BLR 1- (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting).

03/06